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SUPREME COURT NO. _____
COURT OF APPEALS NO. 60538-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISIAH HALL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard D. Eadie, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Isiah Hall, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Hall seeks review of the Court of Appeals published decision in State v. Hall, __ Wn. App. __, __ P.3d ___ (Docket No. 60538-1-I, Slip Op. filed November 17, 2008), attached as an appendix.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because this case involves both a significant question of law under the state and federal constitutions and an issue of substantial public interest--namely, whether an individual's multiple convictions of witness tampering under RCW 9A.72.120(1), premised on his communications with one potential witness in a single proceeding, violate constitutional double jeopardy protections. RAP 13.4(b)(3), (4).

D. ISSUES PRESENTED FOR REVIEW

Whether Division One incorrectly held that the unit of prosecution for tampering with a witness is "any one instance of attempting to induce a witness or a person to do any of the actions set forth in RCW 9A.72-.120," rather than a course of conduct directed towards a particular witness relating to a particular proceeding? Appendix at 5.

E. STATEMENT OF THE CASE

Following a jury trial in King County Superior court, Isiah Hall was convicted of burglary, assault, unlawful possession of a firearm, and three counts of witness tampering. CP 75-84. He was acquitted of one count of assault and one count of tampering with a witness. CP 64, 70.

The charges for tampering with a witness stem from communications between Hall and Desirae Aquiningoc while Hall was in jail prior to his trial. CP 13-14. The charges that resulted in guilty verdicts on counts 6, 7 and 8 are detailed as follows. Count 6 charges that Hall "on or about March 22, 2007, did attempt to induce a witness Desirae Aquiningoc . . . to testify falsely or . . . withhold any testimony or absent herself [from the trial]." CP 13. Counts 7 and 8 contain the same allegations, with the dates of "on or about March 30, 2007," and "on or about April 4, 2007," respectively. CP 14.

At trial, Aquiningoc testified that Hall called her from the jail telephone "[a]t least five times a day," and "almost every day."[1] 3RP 384.

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[1] As in the briefing below, the Reports of Proceedings (RP) are as follows:

1RP = May 16 & 17, 2007;
2RP = May 21 & 22, 2007;
3RP = May 23, 2007;
4RP = May 24, 2007;
5RP = May 29 & July 30, 2007.

Aquiningoc also visited Hall at the jail on several occasions. 3RP 391, 399, 400, 402. Aquiningoc testified that Hall did not want her to come to court, and directed her to stay at his mother's house instead of going to court. 3RP 388. Aquiningoc claimed that Hall also told her what to say if she did testify:

> He wanted me to make up a story about where the gun -- who owned the gun. He wanted me to say it was a friend's of mine, and that he found it, and that he took it because he wanted to go and sell it.

3RP 392. Aquiningoc testified that, at some point, Hall instructed her to "[put] the subpoena that I got back into the mailbox," and to "go on a trip" so that the prosecutor "could not find me." 3RP 399-400.

While Aquiningoc was testifying, the state played recordings of the telephone calls between Hall and Aquiningoc while Hall was in jail prior to trial. Ex. 22 and 23. The jurors were provided with a transcript of the calls. Ex. 24. The prosecutor occasionally stopped the playback of the recording and questioned Aquiningoc about the recorded conversations.

During closing argument, the prosecutor explained which statements formed the basis of each of the four witness tampering counts. The statements for the charges that resulted in guilty verdicts are as follows. As to count 6, on March 22, 2007, Hall allegedly told Aquiningoc: "You might have to do something for me . . . to get me out of here," and,

"Everything I [have been] telling you to do I mean you know you gotta do it though baby okay?" Ex. 24 at 5, 8; 5RP 623. As to count 7, on March 30, 2007, Hall allegedly told Aquiningoc to "go on a vacation for a minute." Ex. 24 at 14; 5RP 623. As to count 8, on April 4, 2007, Hall allegedly told Aquiningoc: "Don't come to court." Ex. 24 at 15; 5RP 623.

On appeal, Hall's primary argument was that the unit of prosecution under RCW 9A.72.120(1)[2] is a course of conduct of attempting to induce a witness in an official proceeding to engage in one of the enumerated list of actions. Hall argued that his multiple convictions for tampering with a witness violated double jeopardy, because the charges all resulted from

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[2] RCW 9A.72.120(1) provides:

> A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings; or
>
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

a single course of conduct--a series of communications with a single anticipated witness in a single criminal proceeding. In the alternative, Hall argued that the statutory language is ambiguous, and therefore should be construed in his favor under the rule of lenity. Division One rejected Hall's claims.

Division One interpreted the statute as prohibiting any attempt to induce a witness or potential witness to do any of the actions enumerated in the statute. The court held that the unit of prosecution for tampering with a witness is "any one instance of attempting to induce a witness or a person to do any of the actions set forth in RCW 9A.72.120." Appendix at 6. The court reasoned that, under Hall's urged reading of the statute, "a defendant would have no incentive to stop after the first attempt, as he would expose himself to criminal liability for only one count of witness tampering no matter how many efforts he made to induce the witness to disappear or testify falsely." Appendix at 5. In the court's opinion, the statute was unambiguous. Appendix at 5.

F. ARGUMENT

DIVISION ONE'S DECISION IN HALL ERRONEOUSLY DEFINED THE UNIT OF PROSECUTION IN A MANNER THAT VIOLATES CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS.

Under Division One's decision interpreting the witness tampering statute as criminalizing each attempt to induce the same witness in the same proceeding, the state may charge an individual ad infinitum for each time he or she requests a potential witness to do one of the listed actions, even in the same sentence, meeting, letter, or phone call. This is an absurd result the legislature did not intend. Alternatively, Hall's interpretation that the statute criminalizes a course of conduct, and that the unit of prosecution under the statute is per witness per proceeding, is at least as reasonable. This Court should accept review of this important constitutional question and issue of substantial public interest.

Under the double jeopardy clause of the Fifth Amendment, multiple convictions under the same criminal statute are prohibited if the legislature intended only one unit of prosecution. U.S. Const. amend. V; State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The state constitutional provision, Wash. Const. art. I, § 9, offers the same scope of protection as its federal counterpart. Adel, 136 Wn.2d at 632. The unit of prosecution may be an act or a course of conduct. State v. Tvedt, 153

Wn.2d 705, 710, 107 P.3d 728 (2005). The unit of prosecution is designed protect the accused from overzealous prosecution. State v. Turner, 102 Wn. App. 202, 210, 6 P.3d 1226 (2000).

An appellate court engages in de novo review of the statutory unit of prosecution, a question of law. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). As this Court stated in State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007):

> In a unit of prosecution case, the first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one "unit of prosecution" is present.

If the legislature has failed to denote the unit of prosecution, any ambiguity should be construed in favor of lenity. Tvedt, 153 Wn.2d at 711; Adel, 136 Wn.2d at 634-35. The remedy for a double jeopardy violation is to vacate any multiplicitous convictions. State v. Westling, 145 Wn.2d 607, 613, 40 P.3d 669 (2002).

RCW 9A.72.120(1) provides:

> A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings; or
>
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

Division One's conclusion that RCW 9A.72.120 is designed to punish each and every "instance" of attempting to induce a witness to act as the statute sets forth is contrary to the plain language of the statute. The language and structure of RCW 9A.72.120(1) indicate that the legislature intended the statute to proscribe a course of conduct, and that the unit of prosecution is per person per official proceeding.

The language and structure of RCW 9A.72.120(1) reveal that the primary purpose of the statute is to prevent the obstruction of justice. The statute focuses on the several categories of behavior that a witness in an official proceeding could take to thwart the administration of justice, and criminalizes the conduct of attempting to induce such behavior. This focus is not surprising, as the legislature evidently found, and the courts have consistently concurred, that attempts to influence a witness to change his testimony or to absent himself from a trial or other official proceeding,

necessarily have as their purpose, and naturally tend, to obstruct justice. See, e.g., State v. Stroh, 91 Wn.2d 580, 582, 588 P.2d 1182 (1979).

The conclusion that the legislature intended for the statute to prevent the result of obstructing justice is also revealed by the statute's focus on the *specific witness* and the *specific proceeding*. Under the statute's plain language, the use of the term "a witness or person" contemplates *a single individual.* This indicates that the legislature intended the unit of prosecution to be "per person." Otherwise, there is no reason for the statute to refer to "a witness or person" in the singular. It is logical for the legislature to define the unit of prosecution as "per witness or person" that the individual attempts to induce, if the statute's aim is to prevent the obstruction of justice, as such a unit of prosecution would provide a disincentive for an individual to attempt to induce multiple witnesses in a single proceeding to act in a manner that thwarts the administration of justice.

For similar reasons, the fact that the statutory language focuses on the "official proceeding" reveals that the purpose of the statute is to punish the attempt to obstruct justice *in a specific proceeding*. The language "any

official proceeding"[3] and "such proceeding" means *the specific proceeding* where the person who the accused is attempting to induce may be called as a witness or has relevant information. This focus is also not surprising, as it is logical for the legislature to define the unit of prosecution by reference to a specific proceeding, in order to provide a disincentive for an individual to attempt to thwart the administration of justice in multiple proceedings. Furthermore, by defining the unit of prosecution as "per witness per official proceeding," the legislature provides further disincentive, in the form of additional charges, against attempting to induce an individual who may be a witness in more than one proceeding from obstructing justice in multiple proceedings.

Contrary to the Court of Appeals opinion, a more reasonable reading of the statute reveals that the "attempts to induce" language refers to a course of conduct. Whether an accused makes only one attempt to induce a witness to do one or all of the statute's listed prohibited acts in relation to a proceeding, or whether he or she makes repeated attempts to induce

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[3] RCW 9A.72.010(4) defines official proceeding as follows:

> A proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions.

the witness, *there is only one end result*, which is the obstruction of justice. Furthermore, the intent of the individual allegedly attempting to induce the witness' behavior is the same whether he or she attempts to induce the witness to give false testimony, withhold relevant information, withhold testimony or absent herself or do any combination of the above. The same is true if the individual makes more than one effort to induce the witness to commit one or more of the above acts. In any case, the intent is still the same--to obstruct justice in the specific proceeding.

The court's holding that the statute defines the unit of prosecution as "per instance" is premised upon the conclusion that the legislature intended the statute's phrase "attempts to induce" to refer to a single act or instance, rather than a course of conduct. There is nothing in the statutory language that supports Division One's conclusion that the unit of prosecution is for a single act, rather than for a course of conduct. The state based its argument for such a reading primarily by reference to the criminal "attempt" statute, RCW 9A.28.020(1), which defines criminal attempt as "any act which is a substantial step toward the commission [of a specified crime]." Brief of Respondent (BOR) at 12-13 (emphasis in Respondent's Brief). The Hall court did not rely on the definition of criminal attempt in reaching its conclusion. Appendix at 5, n. 8 (The State

contends the definition of "criminal attempt" in RCW 9A.28.020(1) applies to "attempt" as used in RCW 9A.72.120, but we do not find this approach helpful.") The Hall court's conclusion that the unit of prosecution for tampering with a witness is "any one instance of attempting to induce a witness or a person to do any of the actions set forth in RCW 9A.72.120," finds no support in the language and structure of RCW 9A.72.120(1).

In practical terms, under Division One's holding in Hall, the state could charge an individual once for each time he or she requests a potential witness to do one of the listed actions, even in the same sentence, meeting, letter, or phone call. After all, each such action is an "instance" of an attempt to induce a witness. This Court recognizes that the state cannot skirt double jeopardy protections by breaking a single crime into temporal or spatial units. Adel, 136 Wn.2d at 635 (citing Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)). Yet, Division One's holding that the unit of prosecution for tampering with a witness is "any one instance of attempting to induce a witness" allows for just such a breaking down of a single crime into smaller temporal units. Appendix at 5.

Alternately, the language of RCW 9A.72.120(1) is susceptible to more than one reasonable interpretation. If the statutory language can

reasonably be interpreted in more than one way, it is ambiguous. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001); In re Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998). If the Legislature has failed to identify the unit of prosecution, or the statute is ambiguous, it must be construed in the defendant's favor. In re Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999); Adel, 136 Wn.2d at 634-35 (citing Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955)).

Assuming the tampering statute can reasonably be read to define the unit of prosecution as Division One interpreted, the statutory language can reasonably be read to define the unit of prosecution as Hall suggests as well. The statute is ambiguous and must be construed in Hall's favor.

G. CONCLUSION

Because Division One's holding in Hall gives the state the power to bring an unlimited number of charges against an individual, it presents a significant question of law under the Constitution of the State of

Washington and of the United States, and an issue of substantial public interest. This Court should grant review. RAP 13.4(b)(3), (4).

DATED this 16th day of December, 2008.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 60538-1-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
ISIAH THOMAS HALL,	)	PUBLISHED IN PART
	)	
Appellant.	)	FILED: November 17, 2008
	)	

ELLINGTON, J. — Isiah Hall was convicted of several crimes, including three counts of tampering with a witness. As to those charges, he argues that his multiple convictions violate the prohibition against double jeopardy. Because the unit of prosecution for tampering with a witness is any one instance of attempting to induce a witness or a person to do any of the actions set forth in RCW 9A.72.120, Hall's double jeopardy protection was not violated. In the unpublished portion of this opinion we reject Hall's argument that his trial counsel was ineffective. We thus affirm.

BACKGROUND

Isiah Hall was initially charged with one count of burglary in the first degree with a firearm enhancement and one count of assault in the second degree. The charges arose from Hall's actions on the night of January 14, 2007. On that night, Hall was alleged to have gone to the apartment of Mellissa Salazar, his former girlfriend, and

pointed a revolver at her. He then allegedly entered without permission and chased an acquaintance of Salazar's, LaMont McKinney, out of the apartment.

Before trial, the State amended the information to charge a total of eight counts. The newly added charges were one count of assault in the second degree, one count of unlawful possession of a firearm, and four counts of tampering with a witness. The witness tampering charges arose from telephone calls Hall made from jail to his girlfriend, Desirae Aquiningoc, regarding her anticipated testimony about Hall's whereabouts on the night in question and about a gun found in her apartment that allegedly belonged to Hall. Aquiningoc testified that during these calls, Hall asked her either to absent herself from trial or testify falsely.

The jury acquitted Hall of one count of assault in the second degree and one count of tempering with a witness, but found him guilty of one count of first degree burglary with a firearm enhancement, one count of second degree assault, one count of second degree unlawful possession of a firearm, and three counts of tampering with a witness. Hall appeals, arguing first that his multiple convictions for witness tampering violate the prohibition against double jeopardy.[1]

ANALYSIS

Under the double jeopardy clause of the Fifth Amendment, multiple convictions under the same criminal statute are prohibited if the legislature intended only one unit of prosecution.[2] The statutory unit of prosecution is a question of law we review de novo.[3]

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[1] Hall did not raise the double jeopardy argument at trial, but constitutional challenges may be raised for the first time on appeal. State v. Adel, 136 Wn.2d 629, 631–32, 965 P.2d 1072 (1998).

[2] Id. at 632. The state constitutional provision, Wash. Const. art. I, § 9, offers the same scope of protection as its federal counterpart. Id.

Washington courts have not before addressed the unit of prosecution under the witness tampering statute, RCW 9A.72.120(1), which provides:

> A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
>
> (b) Absent himself or herself from such proceedings; or
>
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

As in any unit of prosecution case, the first step is to analyze the statute.[4] If the legislature has failed to denote the unit of prosecution, any ambiguity should be construed in favor of lenity.[5] A statute is ambiguous if it is susceptible to two or more reasonable interpretations, not merely because different interpretations are conceivable.[6]

Hall maintains the unit of prosecution for witness tampering is "a course of conduct directed towards a witness or a person in relation to a specific proceeding."[7] He argues that the language of RCW 9A.72.120 focuses on a specific witness and a specific proceeding, and that it does not matter how many attempts a defendant makes to tamper with a single witness as long as the intent to obstruct justice in the specific

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[3] State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005).

[4] State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007).

[5] Adel, 136 Wn.2d at 634–35.

[6] State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

[7] Appellant Br. at 8.

proceeding remains the same. In the alternative, Hall argues that the statutory language is ambiguous, and therefore it should be construed in his favor under the rule of lenity.

Hall's reading of the statute is incorrect. The statute prohibits any attempt[8] to induce a witness or potential witness to do any of the actions enumerated. The focus is upon the attempt to induce, not on the specific identity of the person or proceeding. There is no ambiguity here.

Moreover, Hall's interpretation is not reasonable. Under his reasoning, a defendant would have no incentive to stop after the first attempt, as he would expose himself to criminal liability for only one count of witness tampering no matter how many efforts he made to induce the witness to disappear or testify falsely. This interpretation does not serve the legislative purpose. As the Wisconsin Court of Appeals aptly observed:

> Under [appellant's] reasoning, there would be no incentive to stop attempting to intimidate a witness once the process had begun. Whether a person sent one letter or one hundred letters attempting to intimidate the witness, there would be only one act, regardless of the number of letters and regardless of whether the witness decided to testify. [Appellant's] interpretation would hardly serve to eliminate witness intimidation; indeed, it might well encourage it.[9]

We hold that the unit of prosecution for tampering with a witness is any one instance of attempting to induce a witness or a person to do any of the actions set forth

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[8] The State contends the definition of "criminal attempt" in RCW 9A.28.020(1) applies to "attempt" as used in RCW 9A.72.120, but we do not find this approach helpful.

[9] State v. Moore, 292 Wis.2d 101, 116, 713 N.W.2d 131 (2006) (interpreting the Wisconsin intimidation of witnesses statute). The relevant language reads: "[W]hoever knowingly and maliciously prevents or dissuades, or who attempts to so prevent or

in RCW 9A.72.120. Hall does not argue that his three convictions for witness tampering were not based on three distinct instances of attempt. Therefore, Hall's convictions do not violate double jeopardy.

Affirmed.

The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040.

OTHER ISSUES

Hall argues that his trial counsel's failure to object to inadmissible and prejudicial testimony of certain witnesses and other evidence constitutes ineffective assistance of counsel and warrants reversal.

To prevail on a claim of ineffective assistance of counsel based on counsel's failure to challenge the admission of evidence, an appellant must show "(1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted."[10]

Lamont McKinney, the acquaintance who was visiting Salazar at the time of the January 14, 2007 events, testified that he thought it strange that Salazar would "open the door to somebody that she has a restraining order on them."[11]

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dissuade any witness from attending or giving testimony at any trial, proceeding or inquiry authorized by law, is guilty of a Class A misdemeanor." Wis. Stat. § 940.42.

[10] State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998) (citing State v. McFarland, 127 Wn.2d 322, 336, 337 n.4, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 80, 917 P.2d 563 (1996)).

[11] Report of Proceedings (RP) (May 23, 2007) at 285.

Hall's counsel did not object. The State presented no evidence of a restraining order.

Hall contends his attorney was ineffective. But during closing argument, counsel used McKinney's reference to the restraining order to emphasize the State's failure to present any such evidence and to attack Salazar's credibility because she voluntarily opened the door to a man she claimed was the subject of a restraining order. Hall's attorney may thus have chosen to not object for tactical reasons. In any event, Hall's attorney neutralized the prejudicial effect of the reference by using it to cast doubt on the credibility of the State's essential witnesses. The failure to object to McKinney's testimony did not constitute ineffective assistance.

Detective David Keller worked with Detective John Pavlovich on the search of Aquiningoc's apartment. During cross-examination of Detective Keller, Hall's counsel used a photograph of court documents pertaining to Hall found in the apartment, which listed a different mailing address for Hall. The documents were from a previous criminal case and included the phrase "[t]he defendant shall be released from jail."[12] Hall argues his counsel should have sought redaction of the reference to jail.

But Hall's trial strategy was to disprove his ownership of the gun found at Aquiningoc's home by showing that, at the moment of the search, Hall lived not with Aquiningoc but at the address indicated in the documents. As Hall's attorney knew, the jury would necessarily learn that Hall had a prior conviction because that is an element

[12] RP (May 24, 2007) at 518.

of the offense of unlawful possession of a firearm.[13] Under the circumstances, Hall does not show that failure to remove the jail reference prejudiced him.

Detective Pavlovich was the lead detective on the case. He testified that as a result of his initial investigation, he "determined that several crimes occurred."[14] Hall argues that this was improper opinion testimony on an ultimate issue and thus violated Hall's constitutional right to a jury trial.[15]

The comment that several crimes occurred was not a comment on Hall's guilt. The remark was made in the context of explaining how Detective Pavlovich began his investigation, and made no reference to Hall. Taken in context, the import of the comment was that the detective's first responsibility is to determine whether the facts alleged by the complaining witness would constitute a crime if the allegations proved true. Hall's attorney was not deficient by reason of his failure to object.

Detective Pavlovich testified that when he first interviewed Aquiningoc, he showed her a booking photo of Hall for her to identify him. He testified that during a telephone conversation with Hall prior to his arrest, he told Hall he planned to arrest him, and mentioned that "he had some warrants as well."[16] Defense counsel did not

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[13] See RCW 9.41.040(1)(a) ("A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.").

[14] RP (May 24, 2007) at 490.

[15] Even if otherwise admissible, an opinion by either an expert or a lay witness on the ultimate question of a defendant's guilt violates his constitutional right to the independent determination of the facts by a judge or jury. ER 704; State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

[16] RP (May 24, 2007) at 502.

object to either of these statements. The prosecutor asked the court to strike the reference to the warrants and the court did so.

Detective Pavlovich also described the search of Aquiningoc's home, where the police found a gun in the closet and bullets in a dental container. After Detective Pavlovich identified photographs of the bullets, the prosecutor asked what he meant when he described the evidence as .38 caliber rounds. In response, Detective Pavlovich pulled a .40 caliber cartridge out of his pocket and showed it to the jury. The bullet was not marked, offered, or admitted as evidence.

The court immediately summoned a sidebar conference and expressed concern with Detective Pavlovich's conduct, including his references to the booking photo and Hall's prior warrants, and in particular his unanticipated display of a bullet cartridge. Later, on the record, the court reiterated its concern and the prosecutor apologized for the detective's conduct. The court observed that a mistrial was not warranted.

Hall contends that given the court's expression of concern, his attorney should have sought a mistrial or curative instruction.

As to the mention of the booking photo, as the court stated, "it introduces a suggestion that the defendant has been in jail before, and it puts in clearly inadmissible evidence."[17] But Hall stipulated that he had a prior conviction. Therefore, as with the unredacted documents, counsel's failure to object was not prejudicial.

As to the mention of other warrants, the court struck the reference and explicitly instructed the jury to disregard it. At the conclusion of the trial, the jurors were instructed to disregard any evidence that was not admitted or was stricken from the

[17] Id. at 518.

record. Hall does not establish that these measures were ineffective. He thus does not establish that prejudice resulted from the mentioning of the warrants.

As to the detective's surprising production of the bullet, of which the prosecutor had apparently no more warning than anyone else, the court immediately interrupted the detective's display. The jury was instructed to disregard any evidence not admitted or stricken. Hall does not argue that this instruction was ineffective in curing any prejudice from production of the bullet. In addition, the rounds of ammunition found at Aquiningoc's apartment were admitted at trial without objection, and the dispute at trial was not about the nature of the rounds themselves, but whether Hall had actually possessed the firearm. Under the circumstances, Hall's counsel's failure to seek a mistrial or further curative instruction did not constitute ineffective assistance.

Affirmed.

WE CONCUR: